90-112

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

EDDIE S. YLST, Warden, Petitioner,

v.

VENSON LANE MYERS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Ninth Circuit unjustifiably interfere with the California Supreme Court's management of its docket and shaping of state law, and improperly announce a "new rule" on habeas corpus review in violation of Teague v. Lane, 489 U.S. __, 103 L.Ed.2d 334, 109 S.Ct. __ (1990) plurality op.), and its progeny, when it held in a 2-1 decision that the California Supreme Court violated equal protection in declaring one of its own state-law decisions nonretroactive?

2. Does a state supreme court violate equal protection when, in the management of its own docket, it elects to resolve the issue of the retroactivity of a state-law decision in one case rather than another?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 28, 1990, is reported at 897 F.2d 417. On June 8, 1990, the Court of Appeals denied petitioner's petition for rehearing (one judge voting to grant), and rejected the suggestion for rehearing en banc (one judge voting to grant). The opinion and order are included in the appendix to this petition.

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28, United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground tnat he is in custody in violation of the Constitution or laws or treaties of the United States.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution:

> [N]or [shall any State] deny to any person within its jurisdiction the

equal protection of the laws.

STATEMENT OF THE CASE

A. Statement of the Proceedings

A jury convicted respondent of one count of first degree murder (Cal. Penal Code §§ 187, 189), one count of assault of with intent to commit murder (Cal. Penal Code § 217), and three counts of robbery (Cal. Penal Code § 211). The jury found true firearm use allegations (Cal. Penal Code §§ 12022.5, 1203.06) as to all counts and great bodily injury allegations (Cal. Penal Code § 12022.7) as to the assault with intent to commit murder and two counts of robbery. The jury also found true the special circumstance allegation (Cal. Penal Code § 190.2, subd. (a)(17)(i)) that the murder was committed during the course of a robbery. Respondent moved for a mistrial during the guilt/special circumstance phase of the trial on the ground the procedure used in selecting the jury panel--random selection of jurors from the voter registra-

tion list--resulted in an ethnically unrepresentative jury. The trial court denied the motion.

The jury returned a verdict of death on the murder count and the trial court sentenced respondent accordingly. Respondent's appeal to the California Supreme Court was automatic. Cal. Penal Code § 1239. On January 2, 1987, the California Supreme Court, in a full written opinion, reversed the judgment of death because of instructional error at the penalty phase. The Court affirmed the judgment of guilt and the special circumstance finding, rejecting respondent's claim he was entitled to the retroactive application of People v. Harris, 36 Cal. 3d 36, 201 Cal. Rptr. 782, 679 P.2d 433 (1984), which involved a challenge to the selection of the jury panel similar to that raised at trial by respondent. People v. Myers, 43 Cal. 3d 250, 260-70, 233 Cal. Rptr. 264, 729 P.2d 698 (1987).

Respondent filed a Petition for Rehearing in the California Supreme Court, contending he was entitled to the retroactive application of Harris based on the then-recent decision in Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987). The California Supreme Court requested that the parties file letter briefs regarding whether Griffith was controlling on the issue of the retroactivity of Harris. Following such briefing, all seven members of the California Supreme Court denied respondent's Petition for Rehearing without comment. Because the prosecution chose not to retry the penalty phase, respondent was sentenced to life imprisonment without possibility of parole.

On March 30, 1988, respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. He contended that the California Supreme Court's refusal to apply its Harris decision retroactively to his case

denied him a representative jury under the Sixth Amendment, and denied him due process and equal protection of the laws under the Fourteenth Amendment. On June 30, 1988, the district court entered a judgment denying the petition on the merits. The relevant orders are included in the appendix to this petition.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On February 28, 1990, the Ninth Circuit held that by declaring the decision in People v. Harris, supra, 36 Cal. 3d 36, nonretroactive in respondent's direct appeal (People v. Myers, supra, 43 Cal. 3d 250), the California Supreme Court violated respondent's right to equal protection. On June 8, 1990, the Ninth Circuit denied petitioner's petition for rehearing (one judge voting to grant) and rejected petitioner's suggestion for rehearing en banc (one judge voting to grant).

B. Statement of Facts

The facts necessary to frame the issues raised in this petition relate to the California Supreme Court's handling of several state appeals, all of which involved the question of whether and to what extent the California Supreme Court's own ruling in People v. Harris, supra, 36 Cal. 3d 36, would be retroactively applied.

In Harris, the California Supreme Court, relying on the state and federal constitutional rights to a jury drawn from a fair cross-section of the community, propounded a new standard of proof for establishing a prima facie violation of the fair cross-section right. The court held that a criminal defendant may make such a prima facie showing by comparing figures reflecting the racial composition of the jury panel to figures reflecting the racial makeup of the general population in Los Angeles County, rather than the jury-eligible population. Prior decisions

had held that the jury-eligible population must be used as the comparison base to show underrepresentation on jury panels. Because a majority of the justices could not agree whether and to what extent the new Harris standard of proof should be given retroactive effect, the court expressly left the retroactivity question open, taking "no position as to the disposition of other cases" presenting the same issue. Id. at 59.

Six months later, on October 25, 1984, the California Court of Appeal decided People v. Cantu, 161 Cal. App. 3d 259, 207 Cal. Rptr. 460 (1984), holding that the Harris standard was not retroactive to juries selected before the date of the Harris decision. Thereafter the California Supreme court denied a petition for hearing in Cantu, and remanded two cases in which it had granted hearing on the Harris issue (People v. Pendleton and People v. Brown) to the California Court of Appeal for reconsideration in light of Cantu. Relying on

Cantu, the Court of Appeal held in both Brown and Pendleton that Harris was not retroactive. People v. Pendleton, 167 Cal. App. 3d 413, 212 Cal. Rptr. 524; People v. Brown, 169 Cal. App. 3d 728, 215 Cal. Rptr. 465.

The California Supreme Court, having not yet itself addressed the Harris retroactivity issue, retained jurisdiction over two other cases raising that issue. One was In re Rhymes, a collateral attack on a misdemeanor conviction. The California Supreme Court had granted hearing in Rhymes to review the California Court of Appeal's pre-Harris holding that general population figures could be used to establish a prima facie showing of a fair cross-section violation. The Court of Appeals opinion in Rhymes had declared that its holding was not retroactive. See In re Rhymes, 181 Cal. Rptr. 762 (1982). The other case raising the Harris retroactivity issue was respondent's, People v. Myers, an automatic death penalty appeal that state law

required the California Supreme Court to decide. Cal. Penal Code § 1239. Unlike Rhymes, respondent's automatic appeal raised many issues other than the Harris retroactivity question.

The California Supreme Court elected to resolve the Harris retroactivity issue in respondent's automatic appeal, People v. Myers. In June 1985, long after Harris was final, four members of the court signed a one-sentence order transferring Rhymes to the California Court of Appeal, "with directions to refile its opinion." The Court of Appeal thereafter refiled its original opinion, including its ruling that its pre-Harris standard for establishing a prima facie case of a fair cross-section violation was not retroactive. See In re Rhymes, 170 Cal. App. 3d 1100, 217 Cal. Rptr. 439 (1985). On January 2, 1987, the California Supreme Court decided respondent's automatic appeal, and held for the first time that its decision in

Harris was not retroactive to juries selected before the date of the Harris decision. People v. Myers, supra, 43 Cal. 3d at 269. The court explained its actions in all cases involving the Harris retroactivity issue, and concluded as a matter of state law and procedure that those actions consistently supported the conclusion that Harris should not be retroactive. The court stated:

> Although Harris left the retroactivity question unresolved, we do not write on a clean slate in addressing that issue here. Six months after Harris was filed, the Court of Appeal explicitly addressed the question of the retroactive applicable of Harris in People v. Cantu (1984) 161 Cal.App.3d 259 [207 Cal.Rptr. 460]. After a thorough analysis of the application retroactivity principles and precedents (161 Cal.App.3d at pp. 267-271), the

Cantu court concluded that Harris should not apply retroactively. We denied a petition for hearing in Cantu in January 1985, and then subsequently retransferred two cases presenting Harris issues to the Court of Appeal for reconsideration in light of the Cantu decision. In both cases, the Courts of Appeal thereafter followed Cantu and held that Harris does not apply to cases in which the jury was selected before the Harris opinion was rendered. See People v. Pendleton (1985) 167 Cal.App.3d 413, 416-418 [212 Cal.Rptr. 524]; People v. Brown (1985) 169 Cal.App.3d 728, 734-735 [215 Cal.Rptr. 465].) [¶] Another Court of Appeal decision also sheds light on the retroactivity question presented here. At the time Harris was decided, we had already granted

a hearing in the case of In re Rhymes, the decision which formed the basis for defendant's trial court motion in the present case. In Rhymes, the Court of Appeal--in a decision filed before Harris--had affirmed the trial court's ruling in that case, sustaining Rhymes's challenge to the Pomona jury venire. The Court of Appeal decision in Rhymes, however, had specifically directed that its ruling would not apply retroactively, stating "Our holding shall apply to this case only, until this case becomes final, and thereafter shall apply prospectively. We so provide because of the extent of reliance on the single source for selection of jury venires and because a retroactive application would have a detrimental effect on the administration of justice.

[Citation.]" In June 1985, after Harris was final, we acted on the pending Rhymes matter, transferring the case to the Court of Appeal, "with directions to refile its opinion." The Court of Appeal thereafter refiled its original opinion, with the prospectivity discussion intact. (See In re Rhymes (1985) 170 Cal.App.3d 1100, 1114 [217 Cal.Rptr. 439].); [¶] Thus, while we have not yet had occasion to address the Harris retroactivity [question] in one of our own decisions, our actions since Harris with regard to the relevant Court of Appeal decisions uniformly support the conclusion that Harris should not apply retroactively.

43 Cal. 3d at 265-66.

REASONS FOR ALLOWANCE OF THE WRIT

1. In holding that the California Supreme Court violated equal protection in respondent's automatic appeal when it declared People v. Harris, supra, 36 Cal. 3d 36, to be not retroactive, the Ninth Circuit seriously encroached on the power and ability of a state supreme court to conduct its review of state appeals and to shape state law. In so doing, the Ninth Circuit not only erroneously found an equal protection violation, but also declared a "new rule" that cannot be applied to petitioner's case, thereby violating the principles of Teague v. Lane, 489 U.S. __, 103 L.Ed.2d 334, 109 S.Ct. __ (1989) (plurality op.) and its progeny. The Ninth Circuit failed to mention or discuss the principles of Teague in its opinion. In the exercise of its power of supervision, and in order to correct the Ninth Circuit's disregard of now-settled rules of federal habeas corpus review, this

court should grant the petition for writ of certiorari.

ARGUMENT

I

THE COURT OF APPEALS FOR THE NINTH CIRCUIT UNJUSTIFIABLY INTERFERED WITH THE CALIFORNIA SUPREME COURT'S MANAGEMENT OF ITS DOCKET AND SHAPING OF STATE LAW, AND IMPROPERLY ANNOUNCED A "NEW RULE" ON HABEAS CORPUS REVIEW IN VIOLATION OF TEAGUE V. LANE, 489 U.S. __, 103 L.ED.2D 334, 109 S.CT. __ (1990) PLURALITY OP.), AND ITS PROGENY, WHEN IT HELD IN A 2-1 DECISION THAT THE CALIFORNIA SUPREME COURT VIOLATED EQUAL PROTECTION IN DECLARING ONE OF ITS OWN STATE-LAW DECISIONS NONRETROACTIVE

The decision of the Court of Appeals for the Ninth Circuit in the instant case constitutes an unprecedented, wholly unjustified interference in the California Supreme Court's conduct of its discretionary review of state appeals and its shaping of state law. This unwise and unwarranted interference in state court proceedings clearly constitutes the improper declaration of a "new rule" on habeas corpus review, in violation of principles set

forth in Sawyer v. Smith, __ U.S. __, 58 U.S.L.W. 4905 (1990), Butler v. McKellar, __ U.S. __, 108 L.Ed.2d 347 (1990), Saffle v. Parks, __ U.S. __, 108 L.Ed.2d 415 (1990), Penry v. Lynaugh, 492 U.S. __, 106 L.Ed.2d 256 (1989), and Teague v. Lane, 489 U.S. __, 103 L.Ed.2d 334 (1989) (plurality op.). The Ninth Circuit failed even to mention those principles in its opinion.

Casting aside the California Supreme Court's own explanation of its actions, the Ninth Circuit held, by a 2-1 majority, that in ruling the Harris standard nonretroactive in respondent's automatic appeal, People v. Myers, the California Supreme Court violated respondent's right to equal protection. 897 F.2d at 421-424. Relying solely on the Ninth Circuit decisions in Johnson v. State of Arizona, 462 F.2d 1352, 1354 (9th Cir. 1972) and La Rue v. McCarthy, 833 F.2d 14, 142 (9th Cir. 1987), the majority declared: "The equal protection clause prohibits a state from

affording one person (other than the litigant whose case is the vehicle for the promulgation of a new rule) the retroactive benefit of a ruling on a state constitution's right to an impartial jury while denying it to another." 897 F.2d at 421, n. omitted. The majority implicitly conceded that Johnson and La Rue did not directly control the instant case. In Johnson the court found an equal protection violation in the Arizona Supreme Court's having given eight defendants the retroactive benefit of a decision striking down determinate sentences but having denied it to the petitioner. In La Rue the court suggested in dicta that California courts must apply decisions precluding a charge of felony murder based on child abuse to all cases or none at all. Nonetheless, the majority "extend[ed] the reasoning of Johnson and La Rue to cases involving challenges to the impartiality of a jury in a criminal case," and further declared that Johnson and La Rue had recognized that

"the equal protection clause prohibits de facto as well as explicit, or open, unequal and arbitrary treatment." 897 F.2d at 421.

Having set forth this legal rubric, the majority then determined that the California Supreme Court violated respondent's right to equal protection. The majority's reasoning: despite the California Supreme Court's explanation of its handling of all cases presenting the Harris retroactivity issue, the one-sentence remand order in Rhymes constituted a de facto ruling that Harris was retroactive; hence, having given Rhymes the benefit of Harris, the California Supreme Court could not deny it to respondent or anyone else in his position. Id. at 422-24.

In holding that the remand order in In re Rhymes constituted an authoritative declaration by the California Supreme Court that Harris was retroactive, the Ninth Circuit impermissibly supplanted the California Supreme Court's authoritative interpretation

of state law and procedure. "This court . . . repeatedly has held that state courts are the ultimate expositors of state law [citation], and that we are bound by their constructions except in extreme circumstances not present here." Mullaney v. Wilbur, 421 U.S. 684, 691, n. omitted, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975). In the California Supreme Court's interpretation of state procedure, the remand order in Rhymes was not a holding that the Harris standard was retroactive. Construing its own state procedures, the California Supreme Court held that its handling of all cases presenting the Harris retroactivity issue, including Rhymes, consistently supported the conclusion that Harris should not be given retrospective effect. As a matter of state law, the California Supreme Court held in Myers that the Harris standard was not retroactive. The Ninth Circuit's contrary interpretation of state procedure regarding the effect of the Rhymes remand

order is a clear violation of the concept of federalism. As succinctly put by Judge Kozinski in dissent:

> The one sentence order in Rhymes was not an application of anything; it was a simple housekeeping order, sending back to the Court of Appeal a case that the Supreme Court no longer wished to hear. At the same time, the Supreme Court expressly reserved the retroactivity question for resolution in People v. Myers [citation]. The California Supreme Court chose to resolve the issue of the retroactivity of Harris in one case rather than in another. This was within its authority to do. There is nothing inequitable in that decision, and it provides no excuse for a federal court to micromanage the California Supreme Court's docket, overturning an eight-year-

old murder conviction.

897 F.2d at 426 (dissenting op. of Kozinski, J.).

This unwarranted interference in the California Supreme Court's management of its docket and shaping of state law clearly constitutes a "new rule" that cannot be declared or applied on federal habeas corpus review. Under Teague v. Lane, 489 U.S. __, 109 S.Ct. __, 103 L.Ed.2d 334, 356 (plurality op.) (1989), and Penry v. Lynaugh, __ U.S. __, __ L.Ed.2d __, 109 S.Ct. 2934, 2944 (1989), a threshold question in all habeas corpus cases is whether granting the petitioner the relief he seeks would create a "new rule." New rules cannot be applied or announced on collateral review unless they fall under one of two narrow exceptions. Teague stated that, in general, a case announces a new rule when it "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the

time the defendant's conviction became final." 103 L.Ed.2d at 349, emphasis in original. Two significant decisions, Butler v. McKellar, __ U.S. __, 108 L.Ed.2d 347 (1990), and Saffle v. Parks, __ U.S. __, 108 L.Ed.2d 415 (1990), filed after the Ninth Circuit's opinion in the instant case, greatly expanded the definition of a new rule. Construing Teague, the Court held in Butler v. McKellar, 108 L.Ed.2d at 356, that "[t]he new rule principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Building on that principle, the Court held in Saffle v. Parks that under Butler's "functional view of what constitutes a new rule, our task is to determine whether a state court considering . . . [t]he petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule . . . [petitioner] seeks was

required by the Constitution. 108 L.Ed.2d at 414, emphasis added.

In the instant case, the majority's holding unquestionably resulted in the announcement of a "new rule" under the "functional approach" of Butler v. McKellar and Saffle v. Parks. First, the legal rubric on which the majority relied is drawn solely from Ninth Circuit precedent -- Johnson v. Arizona, supra, 462 F.2d at 1354, and La Rue v. McCarthy, supra, 833 F.2d at 142. However, Johnson and La Rue are not binding on any state court. "[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive in state courts." United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1076 (7th Cir. 1970); see also People v. Burton, 48 Cal. 3d 843, 854 n.2, __ Cal. Rptr. __ (1989). Thus, Johnson and La Rue cannot be said to have "compelled" the California Supreme Court to conclude anything. Saffle v.

Parks, supra. The majority cited no governing United States Supreme authority which would be binding on the California Supreme Court, and petitioner is aware of none.

Second, as the majority implicitly conceded, Johnson and La Rue are factually distinguishable from the instant case. It was only by extending their reasoning that the majority could grant petitioner relief. That the efficacy of the majority's extension of Johnson and La Rue is "susceptible to debate among reasonable minds" (Butler v. McKellar, supra, 108 L.Ed.2d at 356) is conclusively demonstrated by the 2-1 split on the panel. While the majority found an equal protection violation, the dissent did not. This reasoned difference of opinion over the majority's extension of Johnson and La Rue's equal protection reasoning demonstrates in itself that the majority created a new rule when it granted petitioner relief. Butler v. McKellar, supra.

The majority's new rule does not fall under either of the two narrow Teague exceptions. It does not decriminalize a class of conduct nor prohibit a category of punishment for a class of persons. See Saffle v. Parks, supra. Nor does it declare a principle without which the likelihood of obtaining an accurate conviction would be seriously diminished and which is essential to fundamental fairness. See Sawyer v. Smith, __ U.S. __, 58 U.S.L.W. 4905, 4909 (1990). It is, rather, simply a rule attempting to apply the equal protection clause to a state supreme court's management of its docket and determination of whether and to what extent a new state law principle will be applied retroactively. Therefore the majority's ruling is wholly inconsistent with Teague, Penry, Butler, and Saffle. Certiorari must be granted to correct this manifest violation of now-settled principles of federal habeas review.

II

IN ELECTING TO DECIDE THE HARRIS RETROACTIVITY ISSUE IN RESPONDENT'S CASE AND TO REMAND RHYMES TO THE COURT OF APPEAL, THE CALIFORNIA SUPREME COURT DID NOT VIOLATE EQUAL PROTECTION

Even if the merits of the equal protection claim in the instant case could be reached on federal habeas review, and even if the Ninth Circuit had the authority to supplant the California Supreme Court's interpretation of the Rhymes remand order, there simply was no equal protection violation. Unless a classification impinges on the exercise of a "fundamental right," or discriminates against a "suspect class," the classification "will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." Kadrmas v. Dickinson Pub. Schools, 487 U.S. __, 101 L.Ed.2d 399, 409, 108 S.Ct. __ (1988). The classification at issue here involves a state

supreme court's choice as to which of two cases pending on direct appeal it would use to decide the issue of the retroactivity of a state law decision. This classification does not impinge on the exercise of a fundamental right or discriminate against a suspect class. Hence, it is valid so long as it is supported by a rational basis. A rational basis clearly exists. As stated by Judge Kozinski in dissent:

> Rhymes and Myers both arose before the supreme court's decision in Harris, and both presented the Harris issue. Thus, either case could have been used to decide retroactivity, but only one was necessary to do so. The obvious choice was Myers. This was a death penalty case; by statute the California Supreme Court was required to hear Myers's appeal. See Cal.Penal Code § 1239(b).

(West, 1989); Myers, 43 Cal.3d at 255, 233 Cal.Rptr. 264, 729 P.2d 698. Moreover, Myers presented other questions besides the Harris issue. See Myers, 43 Cal.3d at 256, 233 Cal.Rptr. 264, 729 P.2d 698. Rhymes, on the other hand was a collateral attack on a misdemeanor conviction, and presented the Harris issue alone. See Rhymes, 170 Cal.App.3d 1100, 217 Cal.Rptr. 439. Since the California Supreme Court had to hear Myers anyway, deciding the retroactivity issue in Rhymes would have been redundant and a waste of judicial resources. Consequently, the court sent Rhymes back down without review. [¶] I suppose the supreme court could have held Rhymes pending a decision on retroactivity in Myers, but there were very good reasons for not doing

so. At the time her appeal was pending in the supreme court, Deborah Rhymes was awaiting a new trial. Delay is a corrosive factor in a criminal case, potentially prejudicing the rights of the prosecution as well as the defendant. If Rhymes was to be retried--which was certainly a live possibility at the time Myers was set for argument--it needed to be done as promptly as possible, before the evidence grew stale and witnesses died or disappeared. At the same time, Myers--a death penalty case--raised a number of additional issues, and was likely to take a long time to decide. In fact, a year and a half passed between the remand order in Rhymes and the supreme court's decision in Myers. The court therefore had a

rational, indeed prudent, basis for sending Rhymes back for immediate trial. [¶] The reasons for sending Rhymes back were particularly compelling, precisely because the court of appeal had anticipated the supreme court's ruling in Harris. While it may have been constitutionally permissible for the California Supreme Court, in a strict application of non-retroactivity, to deny Rhymes the benefit of a court of appeal ruling eventually proved to be correct, it would certainly have been a harsh result. I respectfully submit that the California Supreme Court is not guilty of a violation of equal protection by reserving the retroactivity question while allowing Rhymes to return to municipal court for a new trial. [¶] The Equal

> Protection Clause does not require perfect equality, merely a rational decision in light of the information available to the decision maker. What the California Supreme Court did here evinces a rational, deliberate decision to deal with two litigants who were, at the time, in unequal situations. The Constitution requires no more.

897 F.2d at 428-49, emphasis added.

Thus, any distinction made by the California Supreme Court between respondent's case and Rhymes was perfectly justified. The Ninth Circuit's erroneous application of equal protection principles, combined with its unwarranted interference in the California Supreme Court's management of its docket, demands that certiorari be granted. "In a federal system, it behooves national courts to display considerable reticence before invading this domain [of a state supreme court's

shaping of state law]. When a state supreme court takes a coherent series of actions, each amply justified by the situation confronting it, the federal courts have no business getting involved." Myers v. Ylst, 897 F.2d at 429 (dissenting op. of Kozinski, J.). If allowed to stand, the Ninth Circuit's decision "will seriously--and unnecessarily--complicate the already difficult task of the California Supreme Court and the eight other supreme courts in . . . [the Ninth] Circuit." Ibid. Such unprecedented encroachment on the role of state courts must not be permitted.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Dated: July 12, 1990.

Respectfully submitted,

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APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VENSON LANE MYERS,
Petitioner-Appellant,

v.

EDDIE S. YLST, Warden,
Respondent-Appellee.

No. 88-6334

D.C. No.
CV-88-1675-IH

OPINION

Appeal from the United States District Court
for the Central District of California
Irving Hill, District Judge, Presiding

Argued and Submitted
April 4, 1989—Pasadena, California

Filed February 28, 1990

Before: Betty B. Fletcher and Alex Kozinski, Circuit Judges,
and C. A. Muecke,* District Judge.

Opinion by Judge Fletcher; Dissent by Judge Kozinski

SUMMARY

Constitutional Law

Reversing the district court's denial of a writ of habeas corpus, the court held that the California Supreme Court violated the equal protection clause by applying its decision in

*Hon. C. A. Muecke, Senior United States District Judge for the District of Arizona, sitting by designation.

People v. Harris, 36 Cal.3d 36 (1984) retroactively to one litigant and not to another in essentially identical circumstances.

In 1979, a jury found appellant Venson Myers guilty of first degree murder, assault, and robbery. Myers, a prisoner serving a life sentence, argued that the California Supreme Court's disparate treatment of his case and an essentially identical case denied him the equal protection of the laws. This appeal turned on the California Supreme Court's handling of three cases: *In re Rhymes*, 215 Cal.Rptr. 852 (1985); *People v. Myers*, 43 Cal.3d. 250 (1987); and *People v. Harris*. *Both Rhymes* and *Myers* raised the question of how a defendant may prove that a jury venire is not sufficiently representative of the community. On April 20, 1984, while both cases were pending before the California Supreme Court, the court decided *Harris*, in which the defendant also challenged the constitutionality of the use of voter registration lists as the basis for the jury venire. *Harris* was the first case in which the California Supreme Court held that a criminal defendant could establish a prima facie case of under-representation of minorities on a jury venire by reliance on the disparity between the percentage of minorities in the general population and the jury venire, rather than on disparities between the jury-eligible population and the jury venire. On June 6, 1985, the California Supreme Court transferred *Rhymes* to the court of appeal with directions to refile its opinion. Rhymes would thus receive a new trial. On January 2, 1987, the California Supreme Court in *Myers* held that *Harris* does not apply retroactively and that Myers' challenge to the jury panel failed because Myers relied on general population figures. Myers would thus not receive a new trial.

[1] If the California Supreme Court retroactively applied *Harris* in *Rhymes* but not in *Myers*, it violated the equal protection clause. The equal protection clause prohibits de facto as well as explicit, or open, unequal, and arbitrary treatment. [2] As a practical matter, the California Supreme Court's refiling order in *Rhymes* afforded Rhymes the benefit of

Harris. [3] Since the court of appeal's decision in *Rhymes* predated *Harris*, and since the California Supreme Court has held that reliance on general population figures was improper under pre-*Harris* authorities, the California Supreme Court could only have permitted the court of appeal's holding on the use of general population statistics to stand by de facto applying *Harris* retroactively. [4] In *Rhymes*, the California Supreme Court decided to grant a criminal defendant the retroactive benefit of *Harris* by means of a refiling order. In *Myers*, the court denied a criminal defendant the retroactive benefit of *Harris* in a full opinion. The decision to deny Myers the benefit accorded Rhymes is not made constitutional simply because Rhymes received her benefit by means of a refiling order, rather than by a full opinion. [5] The California Supreme Court violated the equal protection clause when it denied Myers the retroactive benefit of *Harris*.

Judge Kozinski dissented in a separate opinion, stating that he saw no inconsistency or invidiousness in the actions of the California Supreme Court. The court was under no obligation to decide the retroactivity of *Harris* in *Rhymes*, *Myers*, or any other case. The equal protection clause prevents the court from only applying *Harris* to one litigant and not to another. As long as the court continued to avoid review of decisions dealing with the *Harris* issue, it could decide the retroactivity question whenever it thought appropriate.

COUNSEL

Harvey R. Zall, State Public Defender, Donald L.A. Kerson, Deputy State Public Defender, San Francisco, California, for the petitioner-appellant.

Thomas L. Willhite, Deputy Attorney General, State of California, Los Angeles, California, for the respondent-appellee.

OPINION

FLETCHER, Circuit Judge:

I

Myers, a prisoner serving a life sentence, petitioned for a writ of habeas corpus in the district court arguing that the California Supreme Court's disparate treatment of his case and an essentially identical case denied him the equal protection of the laws. The district court denied the writ. We reverse.

I

In 1979, a jury found Myers guilty of first degree murder, assault, and robbery. Myers argues that the California Supreme Court's refusal to order a new jury trial in his case was unconstitutional. In Myers' view, the California Supreme Court violated the equal protection clause when it declined to apply a decision regarding the right to an impartial jury retroactively in his case even though it had done so in an essentially identical case.

This appeal turns on the Supreme Court of California's handling of three cases—*In re Rhymes*, 215 Cal.Rptr. 852 (1985),[1] *People v. Myers*, 43 Cal.3d 250, 729 P.2d 698, 233 Cal.Rptr. 264 (1987), and *People v. Harris*, 36 Cal.3d 36, 679 P.2d 433, 201 Cal.Rptr. 782 (1984). *Rhymes* and *Myers* were pending on appeal before the supreme court when the court decided *Harris*.

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[1]In *Rhymes*, the Supreme Court of California, by order, directed the California Court of Appeal to refile an opinion originally published at 130 Cal.App.3d 232, 181 Cal.Rptr. 764 (1982). Pursuant to the supreme court's order, the court of appeal refiled the opinion at 170 Cal.App.3d 1100, 217 Cal.Rptr. 439 (1985).

The relevant facts and issues in *Rhymes* and *Myers* were essentially identical. Both cases raised the question of how a defendant may prove that a jury venire is not sufficiently representative of the community.

In *Rhymes*, the defendant argued in a state habeas corpus proceeding before the Los Angeles County Superior Court that her conviction, handed down by a Pomona jury, should be reversed because the Pomona Judicial District's reliance on voter registration lists violated the United States' and California's constitutional guarantees of a trial by an impartial jury drawn from a cross-section of the community. The superior court conducted an evidentiary hearing and concluded on October 20, 1980 that Rhymes should be granted the writ.

At the time the writ was granted in *Rhymes*, Myers' trial, which also took place in Pomona, was in the jury selection phase. Three days after the superior court's decision in *Rhymes*, and before jury selection was completed in his own case, Myers timely moved for a mistrial. The primary basis for Myers' challenge consisted of statistical reports and evaluations introduced in the *Rhymes* case. *Myers*, 43 Cal.3d at 261, 729 P.2d at 704, 233 Cal.Rptr. at 269 (Myers "relied almost entirely on the statistical studies, legal briefs, referee's report, and order in the *Rhymes* case"). The statistics compared the percentages of racial minorities on jury panels in Pomona with the percentages of racial minorities in the general population of Los Angeles County. "The only difference between *Rhymes* and [*Myers*] is that Rhymes was tried by a municipal court jury in the Pomona Judicial District, while [Myers] was tried by a superior court jury in that same district. However, the deputy jury commissioner testified in [*Myers*] that superior and municipal court juries in Pomona are chosen *from the same pool.*" *Myers*, 43 Cal.3d at 283, 729 P.2d at 719-20, 233 Cal.Rptr. at 285 (Bird, C.J., dissenting).

Myers' motion for a mistrial was denied. His trial proceeded, and he received a sentence of death. Because the

judgment was death. Myers' appeal was taken directly from the trial court to the California Supreme Court.

At the time *Myers* was transferred, *Rhymes* was pending before the California Court of Appeal. On April 21, 1982, that court affirmed the superior court's holding that Rhymes had made a prima facie case of under-representation of blacks in Pomona's jury venire. The court of appeal held that a challenge to the use of voter registration lists may be based on comparisons between minority representation on venires and their representation in the *general population*. The court held that the defendant need not compare minority representation on venires to that in the voter population or in the "eligible-to-vote" population: "While it is true that courts have repeatedly stated that no reliable conclusion can be drawn when total population rather than voter population or eligible population is used, uncertainty in the ratio between the eligible and the total population does not preclude a court from finding under-representation when total population is used as the base." *Rhymes*, 170 Cal.App.3d at 1111-1112, 181 Cal.Rptr. at 771. The court of appeal accordingly ordered a new trial.

On May 27, 1982, the California Supreme Court granted hearing in *Rhymes*.

On April 20, 1984, while both *Rhymes* and *Myers* were pending before the California Supreme Court, the court decided *Harris*. In *Harris*, the defendant also challenged the constitutionality of the use of voter registration lists as the basis for the jury venire. As in *Myers* and *Rhymes*, the proof was statistics that compared the representation of minorities on jury venires with their representation in the general population of Los Angeles County. The only difference between the *Harris* case and the *Myers* and *Rhymes* cases is that Harris was tried in Long Beach, while the other two were tried in Pomona. *Harris* was the first case in which the California Supreme Court held that a criminal defendant could establish a prima facie case of under-representation of minorities on a

jury venire by reliance on the disparity between the percentage of minorities in the general population and the jury venire, rather than on disparities between the jury-eligible population and the jury venire. The court accordingly remanded for a new trial. The court reserved the question whether its new rule would be applied retroactively.

On June 6, 1985, the California Supreme Court transferred the case of *In re Rhymes* to the court of appeal "with directions to refile its opinion." 701 P.2d 1170, 215 Cal.Rptr. 852. Rhymes would thus receive a new trial.

On January 2, 1987, the California Supreme Court in *Myers* held that *Harris* does not apply retroactively and that Myers' challenge to his jury panel therefore failed because Myers relied on general population figures. Myers would thus not receive a new trial.[2]

The decision whether to grant or deny a petition for habeas corpus is reviewed de novo. *Chatman v. Marquez*, 754 F.2d 1531, 1533-34 (9th Cir. 1985). We have jurisdiction pursuant to 28 U.S.C. § 2253.

II

As a preliminary matter, we address the state's argument that Myers did not base his equal protection argument in the district court on the disparate treatment accorded the *Rhymes* case and his case and that he is therefore precluded from doing so on appeal. The state concedes that Myers argued that he had been denied equal protection in the district court, but contends that his equal protection argument was based solely on *Griffith v. Kentucky*, 479 U.S. 314 (1987). In *Griffith*, the Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all

[2]In the same opinion, the court reversed Myers death sentence for reasons unrelated to jury selection. He is now serving a life term.

cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constituted a 'clear break' with the past." 479 U.S. at 328.[3]

Our review of the record persuades us that Myers raised his *Rhymes* theory in the district court and thus preserved it for appeal. Myers' habeas petition did not specifically rely on *Griffith*. Rather, the petition simply stated that the California Supreme Court's decision not to apply *Harris* retroactively to his case denied him equal protection. In his memorandum in support of the petition, Myers based his equal protection argument in part on the disparate treatment afforded Rhymes and himself:

> The inequities are doubled when we consider the relationship of appellant to Deborah Rhymes. The *Myers* challenge was tried in the same courthouse and on the identical evidentiary record as *Rhymes*. Both cases were pending together in appellate courts for over one year before Ms. Rhymes obtained a favorable decision on the jury question. (*In re Rhymes* (1982) 181 Cal.Rptr. 764). The California Supreme Court granted a hearing in *Rhymes*, and then for two years *Myers* and *Rhymes* sat side-by-side waiting to be decided. After the *Harris* decision, the Supreme Court, in 1984, transferred *Rhymes* back to the Court of Appeal with directions to refile the 1982 opinion.
>
> So, over a several year period three people had cases pending in the California Supreme Court raising the identical issue. Two of them [Rhymes and Harris] got the benefit of the new rule. Venson Myers did not.

[3]*Griffith* was decided only eleven days after the California Supreme Court decided *Myers*. Myers then filed a petition for rehearing to the California Supreme Court, asking it to reconsider in light of *Griffith*. The court ordered briefing and denied the petition without opinion.

In Myers' reply to the state's opposition to the petition, he again raised the *Rhymes* issue:

> On evidence almost identical to what we have here Mr. Harris was granted an entire new trial. On exactly the same evidence Ms. Rhymes was given an entire new trial. It is "the most basic principle of jurisprudence that 'we must act alike in all cases of like nature.'" (Friendly, Indiscretion About Discretion (1982) 31 Emory L. J. 747, 758.)

Finally, Myers presented his equal protection/*Rhymes* argument forcefully in his objections to the magistrate's report and recommendations:

> Venson Myers and Deborah Rhymes were tried in the same courthouse within weeks of each other. The jury challenge in *Myers* was the record of the jury challenge in *Rhymes*. The *Rhymes* and *Myers* cases were both pending in the California Supreme Court at the same time. After *Harris* was decided the California Supreme Court disposed of *Rhymes* in a way that gave Ms. Rhymes the practical benefit of the *Harris* rule. Myers did not get that benefit.
>
> Even if respondent is correct and *Griffith* has nothing to do with retroactivity of state court decisions, the California Supreme Court's treatment of *Myers* and *Rhymes* violates petitioner's right to the equal protection of the laws.
>
> "Although the state court has the right to make a ruling retroactive, prospective, or permit limited retroactivity, once it has established a rule it must apply it with an even hand." (*Northrop v. Alexander*, 642 F.Supp. at p.329; *Johnson v. Arizona*, (9th Cir. 1972) 462 F.2d 1352).

> The Magistrate, like the California Supreme Court, has not even suggested a principled reason for this disparate treatment of Rhymes and Myers on identical evidence.

In sum, we find no support for the state's contention that Myers failed to raise the *Rhymes* argument below.

III

The equal protection clause prohibits a state from affording one person (other than the litigant whose case is the vehicle for the promulgation of a new rule) the retroactive benefit of a ruling on a state constitution's right to an impartial jury while denying it to another.[4] In *Johnson v. State of Arizona*, 462 F.2d 1352, 1354 (9th Cir. 1972), we held that the State of Arizona could not apply a decision striking down determinate sentences retroactively in some cases but not all. Although a number of sentences had been vacated for resentencing in light of a decision by the Arizona Supreme Court (*Ard v. State ex. rel. Superior Court*, 102 Ariz. 221, 427 P.2d 913 (1967)), the Arizona Supreme Court refused to vacate Johnson's determinate sentence. Relying on the equal protection clause, the court remanded to the district court to consider the retroactivity of the *Ard* decision and stated that "[i]f not so reconsidered within 45 days, the writ shall issue." *Johnson*, 462 F.2d at 1354. In *La Rue v. McCarthy*, 833 F.2d 140, 142 (9th Cir. 1987), we suggested that California must apply decisions holding that a felony murder charge may not be based on child abuse retroactively in all cases or in none. "[W]e agree that once a state has established a rule it must be applied evenhandedly." *Id.* at 142 (citing *Johnson v. Arizona*, 462 F.2d 1352, 1354 (9th Cir. 1972)).

[4]An exception is made for the litigant whose cases establishes the rule, because otherwise there would be no incentive for an individual litigant to challenge existing interpretations of law. *See Stovall v. Denno*, 388 U.S. 293, 301 (1967).

There is no reason not to extend the reasoning of *Johnson* and *La Rue* to cases involving challenges to the impartiality of a jury in a criminal case. Like rules regarding sentencing and the definition of felony murder, rules regarding the selection of juries in criminal cases involve an important aspect of a person's treatment in the criminal justice system. A state should not be permitted to treat defendants differently for the purposes of jury selection unless it has "some rational basis, announced with reasonable precision" for doing so. *Johnson*, 462 F.2d at 1354.

[1] If the California Supreme Court retroactively applied *Harris* in *Rhymes* but not in *Myers*, it violated the equal protection clause. As we recognized in *Johnson* and *La Rue*, the equal protection clause prohibits de facto as well as explicit, or open, unequal and arbitrary treatment. Thus, the relevant question is whether the California Supreme Court in effect afforded Rhymes the retroactive benefit of *Harris* while denying Myers that benefit.

IV

The state argues that the refiling order in *Rhymes* was not a retroactive application of *Harris* because (1) the refiling order did not necessarily imply that Rhymes was receiving the benefit of *Harris*; and (2) the refiling order was merely a "procedural ruling" and thus could not qualify as a substantive retroactive application of the *Harris* ruling. Neither of these arguments has merit.

a. *Whether The Refiling Order Necessarily Implies That Rhymes Received the Benefit of* Harris

[2] As a practical matter, the California Supreme Court's refiling order in *Rhymes* afforded Rhymes the benefit of *Harris*. In January of 1987, the California Supreme Court held that Myers' reliance on comparisons between minority representation on venires and their representation in the gen-

eral population was improper "under the 'pre-*Harris*' authorities." *Myers*, 43 Cal.3d at 269, 729 P.2d at 710, 233 Cal.Rptr. at 275. "[V]irtually all the California decisions which had addressed challenges to the use of voter registration lists before *Harris* had rejected evidentiary presentations which relied on general population, rather than jury-eligible statistics . . . . *Harris* simply created a new standard for determining the existence of a prima facie case." 43 Cal.3d at 268, 729 P.2d at 709, 233 Cal.Rptr. at 274-75. *See also People v. Pendleton*, 167 Cal.App.3d 417, 212 Cal.Rptr. 524, 526 (1985)("The 'pre-*Harris*' rule can be stated as follows: 'Courts have repeatedly emphasized that no reliable conclusion can be drawn when total population rather than voter population is used as a base.' ") (citation omitted).

[3] The court of appeal in *Rhymes* held that a defendant could base his prima facie case of jury under-representation on comparisons between minority representation on venires and their representation in the general population. Since the court of appeal's decision in *Rhymes* pre-dated *Harris* and since the California Supreme Court has held that reliance on general population figures was improper "under the pre-*Harris* authorities," *Myers*, 250 Cal.3d at 269, the California Supreme Court could only have permitted the court of appeal's holding on the use of general population statistics to stand by de facto applying *Harris* retroactively.

b. *Whether The Refiling Order Was A Mere Procedural Order*

The state argues that the order to refile the court of appeal's opinion was merely a "procedural" device for disposing of the case and thus did not indicate that the California Supreme Court approved of the court of appeal's holding on the use of general population statistics. The state contends that, since the California Supreme Court in effect decided *not* to decide the *Rhymes* case, the court reached the issue of the retroactivity of *Harris* for the first time in *Myers*. It is arguable that the

equal protection clause does not prohibit a court from disposing of a case on merely "procedural" grounds when the end result of that "procedural" disposition is to give one criminal defendant the practical benefit of a new rule of state criminal procedure while denying that benefit to another criminal defendant in an essentially identical case. We need not reach this issue, however, since the order to refile in *Rhymes* was not merely a "procedural" decision that expressed no view as to the merits of Rhymes' appeal.

The California Supreme Court granted a hearing in the *Rhymes* case. In the often-cited case of *Knouse v. Nimmocks*, 8 Cal.2d 982, 66 P.2d 438, 439 (1937), the California Supreme Court explained the effect of a grant of hearing:

> The opinion and decision of the District Court of Appeal, by our order of transfer, have become a nullity and are of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. . . . [W]ithout some further express act of approval or adoption of said opinion by this court, that opinion and decision are of no more effect, as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise, than if they had not been written.

Under the law existing in California at the time the supreme court withdrew the *Rhymes* opinion and granted a hearing, the court had to approve or adopt the lower court's opinion if it agreed with the lower court, or alternatively, it had to reverse the lower court if it disagreed. Either way, the supreme court had to make a substantive ruling on the merits.[5] The court's decision to transfer the case back to the

[5]As a result of an amendment to the California Constitution passed three years after the grant of hearing in *Rhymes*, the California Supreme Court no longer follows the unusual procedure of vacating lower court opinions that it decides to review. *See* Rules 28 and 29 of the California Appellate Rules. Prior to the amendment, California was one of only three states whose highest court vacated appellate court decisions prior to reviewing them.

court of appeal with directions to refile its opinion was an approval of the court of appeal's decision in *Rhymes*. The supreme court in effect retroactively applied *Harris*.

The supreme court's opinion in *Myers* itself lends further support to the proposition that the supreme court's refile order in *Rhymes* had substantive implications. In *Rhymes*, the court of appeal, in addition to deciding that general poulation statistics could be used to establish a prima facie case of group under-representation on a jury venire, also decided the question of the retroactivity of its holding. The court of appeal held that its decision would be prospective only. In *Myers*, the supreme court reasoned that its decision to order the refiling of *Rhymes* is one of "our actions since *Harris* [which] . . . support[s] the conclusion that *Harris* should not apply retroactively." 43 Cal.3d at 265-66, 729 P.2d at 707, 233 Cal.Rptr. at 272. The court can't have it both ways: if the refile order constitutes approval of the part of *Rhymes* dealing with retroactivity, how could it not simultaneously constitute approval of the court of appeal's holding in *Rhymes* that a defendant could establish a prima facie case of under-representation by reference to general population statistics? The fact that the court in *Myers* felt compelled to argue that its order in *Rhymes* was consistent with its holding in *Myers* is proof positive that a refiling order is a substantive disposition on the merits. *See also People v Osuna*, 187 Cal.App.3d 845, 847, 232 Cal.Rptr. 220, 221 (1986) ("Our high court's directive to 'refile [our] opinion,' . . . demonstrates its members . . . agreed with our original conclusion.")[6]

[6]The court often transfers cases with instructions to refile the opinion with minor modifications, such as the addition of relevant citations. *See, e.g., Zarback v. Superior Court*, 763 P.2d 479, 252 Cal.Rptr. 816 (1988). The court of appeal's jurisdiction upon retransfer is limited to execution of the supreme court's direction. *M Restaurants, Inc. v. San Francisco Hotel Joint Executive Bd. of Culinary Workers*, 124 Cal.App.3d 666, 177 Cal.Rptr. 690, 693 (1981).

A refiling order appears to be somewhat analogous to a summary affirmance by the United States Supreme Court. The Supreme Court has held

[4] At the time it decided *Harris*, the California Supreme Court had pending before it two cases raising essentially identical issues. In *Rhymes*, it decided to grant a criminal defendant the retroactive benefit of *Harris* by means of a refiling order. In *Myers*, the court denied a criminal defendant the retroactive benefit of *Harris* in a full opinion. The California Supreme Court's decision to deny Myers the benefit accorded Rhymes is not made constitutional simply because Rhymes received her benefit by means of a refiling order, rather than by a full opinion.[7]

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that a "summary affirmance settles the issues for the parties," *Fusari v. Steinberg*, 419 U.S. 379, 392 (1975), and demonstrates the Supreme Court's approval of the judgment of the lower court. At the same time, the Court has warned that a summary affirmance does not necessarily mean that the Court "adopted the reasoning as well as the judgment" of the lower court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). In this case, however, the California Supreme Court's order to refile the *Rhymes* opinion makes sense *only* if one assumes that the supreme court agreed with the court of appeal on the acceptability of general population statistics.

[7]The dissent argues that the refile order cannot be a substantive decision because Article VI § 14 of the California Constitution provides: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." The dissent interprets "causes" to mean dispositions on the merits. The problem with the dissent's argument is that it is inconsistent with the California Supreme Court's and this circuit's interpretation of the California Constitution.

In *People v. Ford*, 30 Cal.3d 209, 178 Cal.Rptr. 196 (1981), the California Supreme Court disposed of several contentions simply by referencing the opinion of the court of appeal, even though that opinion had been vacated and nullified by the supreme court's grant of a hearing in that case. Against the argument that such an action violated § 14, the supreme court stated that the lower court's written opinion, although vacated, satisfied the supreme court's duty to comply with § 14 because "[a] copy of that opinion, of course, was duly furnished to all parties herein, and remains available in the public records of this court and the Court of Appeal." *Ford*, 178 Cal.Rptr. at 200. In other words, the purpose of § 14 is simply to furnish the parties with an explanation of the appellate court's reasoning, even if that reasoning is contained in a nullified document. In Rhymes' case, the parties have been furnished two written opinions from appellate courts, so § 14 has clearly been complied with.

PUBLISHER'S NOTE

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We read *Harris* as an interpretation of both the United States and California Constitutions. The *Harris* court introduces its discussion of the merits of Harris' challenge with the statement that the right to an impartial jury drawn from a representative cross-section of the community is guaranteed by the Sixth Amendment of the United States Constitution and Article I of the California Constitution. 36 Cal.3d at 48-49, 679 P.2d at 439, 201 Cal.Rptr. at 788. In doing so, the court implies that both the state and federal constitutions mandate its holding with respect to challenges to voter registration lists. This interpretation is also supported by the *Harris* court's citation to both California and federal cases. 36 Cal.3d at 48-50, 53, 679 P.2d at 439-40, 442, 201 Cal.Rptr. at 788-89, 791.

The history of California constitutional law suggests that the *Harris* court did not hold that the California Constitution permits a defendant to make out a prima facie challenge to voter registration lists based on general population statistics simply because it believed that federal law permits a defendant to do so. *Cf. Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)(state ground is not independent and adequate ground so as to preclude Supreme Court review if the state court decided the state constitutional issue "the way it did because it believed that federal law required it to do so"). With respect to the right to a jury trial, California has a long history of imposing a higher standard under its constitution than exists under the federal constitution. The *Harris* court discussed at some length *People v. Wheeler*, 22 Cal.3d 258, 270, 583 P.2d 748, 757, 148 Cal.Rptr. 890, 898-99 (1978)(footnote omitted), an opinion which reviews this history:

> We have reviewed this line of United States Supreme Court opinions in some detail because we fully agree with the views there expressed as to the importance of the representative cross-section rule, particularly in protecting the constitutional right to a jury. We rely equally, however, on the law of Cali-

> fornia. It was not until its 1975 decision in *Taylor* that the high federal court imposed the representative cross-section rule on the states as a fundamental component of the Sixth Amendment right to an impartial jury incorporated in the Fourteenth Amendment. In California we had long since adopted that rule.

In sum, we conclude that the correctness of *Harris* as a matter of federal law is irrelevant because *Harris* is independently grounded in an interpretation of the California Constitution.[9]

VI

[5] We hold that the California Supreme Court violated the equal protection clause when it denied Myers the retroactive benefit of *Harris*. We reverse the district court's denial of the writ of habeas corpus and remand this case to the district court with the direction that it issue the writ and determine a reasonable time in which to retry Myers.

KOZINSKI, Circuit Judge, dissenting:

According to the majority, the California Supreme Court's remand order in *In re Rhymes*, 215 Cal Rptr 852 (1985), instructing the court of appeal to refile its opinion, constituted a retroactive application of *People* v *Harris*, 36 Cal 3d 36, 201 Cal Rptr 782 (1984). Having applied *Harris*

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[9]Moreover, in this appeal from Myers' habeas proceeding, we are not reviewing *Harris*. We are only concerned with equal protection. Even if *Harris* were decided exclusively on erroneous federal grounds, the state court would still have to apply its erroneous reading evenhandedly. If one person receives the benefit of a state court interpretation of federal law, so should a second—as long as the United States Supreme Court does not decide the issue in the time between the two cases or the state supreme court does not overrule its previous decision.

retroactively in *Rhymes*, the majority reasons, the supreme court was thereafter precluded from denying Venson Myers, or anyone else in his position, the benefit of *Harris*.

The majority reaches the wrong conclusion because it starts with a faulty premise. The one sentence order in *Rhymes* was not an application of anything; it was a simple housekeeping order, sending back to the court of appeal a case that the supreme court no longer wished to hear. At the same time, the supreme court expressly reserved the retroactivity question for resolution in *People* v *Myers*, 43 Cal 3d 250, 233 Cal Rptr 264 (1987). The California Supreme Court chose to resolve the issue of the retroactivity of *Harris* in one case rather than in another. This was within its authority to do. There is nothing inequitable in that decision, and it provides no excuse for a federal court to micromanage the California Supreme Court's docket, overturning an eight-year-old murder conviction.

I

In *Harris*, the Supreme Court of California decided that defendants may challenge juries selected from voter registration lists by comparing minority representation on those lists to minority representation in the general population. *Harris*, 36 Cal 3d at 59. The court explicitly left open the question whether its ruling would apply retroactively: A majority of the justices of this court, however, do not agree on whether, and to what extent, the rule announced in this case should be given retroactive effect. *We therefore take no position as to the disposition of other cases presenting issues concerning the representative character of juries selected from voter registration lists alone.*

Id (emphasis added).

At that time, both *Rhymes* and *Myers* were before the court, having been held pending *Harris*. Both cases presented

the same substantive issue as *Harris* but, obviously, only one was necessary in order to decide the question of retroactivity. The court picked *Myers* for the resolution of that question and sent *Rhymes* back to the court of appeal with instructions to refile its opinion.

In *Myers*, the supreme court for the first time addressed the retroactivity issue and denied Myers the benefit of *Harris*. *Myers*, 43 Cal 3d at 269.

I see no inconsistency or invidiousness in the actions of the California Supreme Court. The court was under no obligation to decide the retroactivity of *Harris* in *Rhymes*, *Myers* or any other case. The Equal Protection Clause prevents the court only from applying *Harris* retroactively to one litigant but not to another. As long as the court continued to avoid review of lower court decisions dealing with the *Harris* issue, it could decide the retroactivity question whenever it thought it most appropriate.

That is what happened here. Finding itself divided over the question of retroactivity in *Harris*, the court made a considered decision to leave that question open. It then scheduled for argument one of two cases on its docket appropriate for resolving the retroactivity issue, sending the other back to the court of appeal untouched.

By contrast, the majority believes that the supreme court conclusively decided retroactivity when it remanded *Rhymes*. But the remand order clearly was *not* a retroactive application of *Harris*. For one thing, the supreme court's refile order in *Rhymes* is not a decision on the merits under California law. Article VI, section 14 of the California Constitution limits the methods by which California appellate courts may dispose of cases on the merits by requiring a written disposition containing stated reasons: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." Cal Const, Art VI,

§ 14. The term "causes" "has been interpreted to mean decisions on the *merits*." B.E. Witkin, 9 *California Procedure* § 554 at 541 (Bancroft-Whitney, 3d ed 1985) (emphasis original).

The *Rhymes* order stated in its entirety:

> The above entitled matter is retransferred to the Court of Appeal, Second Appellate District, Division One, with directions to refile its opinion.
>
> BIRD, C.J., and BROUSSARD, REYNOSO and GRODIN, JJ., concur.

In re Rhymes, 215 Cal Rptr 852 (1985). This laconic order hardly comports with section 14: Not only does it fail to contain a statement of reasons, it does not even purport to be the action of the full court. While four justices signed the order, it is unclear whether the remaining three justices agreed, disagreed or even participated in the decision. If the refile order in *Rhymes* was a disposition on the merits, it would surely place the California Supreme Court in violation of the state's constitution, not merely in that case, but in the many other cases where the court has employed a similar device.

The majority relies on *People* v *Ford*, 30 Cal 3d 209, 178 Cal Rptr 196 (1981), for the proposition that the California Supreme Court can, consistent with its own constitution, reach the merits of a case without stating reasons. But *Ford* does not help the majority here. In *Ford*, the supreme court published a full written opinion, with all justices accounted for, in which it explicitly adopted part of the court of appeal decision as its own. 30 Cal 3d at 216. The unpublished court of appeal decision was referenced as a statement of the reasons for part of the *supreme court's own judgment* in the case. In sharp contrast, the *Rhymes* order did not adopt the court of appeal decision, nor did it reach any decision of its own; it simply retransferred the case without comment. The opinion

of the California Supreme Court in *Ford* is published in *California Reports*. By the majority's reasoning, the supreme court's opinion in *Rhymes* is published in *California Appellate Reports*. I suggest that this would make legal research in California extremely difficult.[1]

Similarly, the majority places too much emphasis on the rule of *Knouse* v *Nimocks*, 8 Cal 2d 482, 66 P2d 438 (1937). The majority reasons that, because the court of appeal decision becomes a nullity when a case is transferred to the

[1] *Harris* v *Superior Court*, 500 F2d 1124 (9th Cir 1974), and *Lewis* v *Borg*, 879 F2d 697 (9th Cir 1989), are even less relevant. First of all, neither case discussed the requirements of California Constitution Article VI, section 14. Moreover, those cases dealt with the issue of when the California Supreme Court's summary denial of a state habeas petition will satisfy the exhaustion of state remedies requirement for federal habeas review. Such denials are decisions on the merits only in the sense that they fail to indicate that the supreme court denied state habeas on the basis of a procedural default. The petitioner thereby demonstrates to the federal court that there is nothing left for him to do in state court. *Harris* v *Superior Court*, 500 F2d at 1128-29. As long as the supreme court's action was *not* based on a procedural default, the federal court's inquiry into the nature of that action is at an end.

This is a far different inquiry than we must make today. We are not concerned with whether the *Rhymes* refile order was evidence of exhaustion. Rather, we must decide whether the order was an explicit adoption of a lower court ruling. *Harris* v *Superior Court* and *Lewis* will not support the majority's conclusion that it was.

LaRue v *McCarthy*, 833 F2d 140 (9th Cir 1987), also will not make the majority's case. In *LaRue*, the petitioner claimed that the California Supreme Court had denied him equal protection by rejecting his petition for a writ of habeas corpus, and thereby refusing to apply retroactively a recent supreme court case. We found no evidence that the supreme court had ever applied the recent case retroactively, and hence found no violation of equal protection. Id at 142. Relying on *Harris*, we also concluded that the California Supreme Court's summary denial of the petition for habeas was a decision on the merits as to nonretroactivity. Id at 143. This conclusion was unnecessary, as the equal protection issue had already been resolved. *LaRue*, like *Harris* and *Lewis*, did not consider the effect of section 14.

supreme court, the higher court therefore has no option but to reach the merits of the case. This analysis ignores the possibility that, instead of approving, adopting or reversing the lower court, the supreme court may, in light of intervening circumstances, simply change its mind about hearing the case at all.

That is precisely what the court did in *Rhymes*. Having chosen *Myers* to resolve the retroactivity issue, there was nothing to be done with *Rhymes*, so the supreme court reversed its decision to hear the case. This is not a decision on the merits. As Bernard Witkin, the leading authority on California procedure, has noted:

> [B]y granting a hearing and later directing adoption of the same opinion, the Supreme Court in effect render[s] a delayed order denying a hearing.

B.E. Witkin, 9 *California Procedure* § 708 at 680 (Bancroft-Whitney, 3d ed 1985). This court has previously recognized the well-established rule that "[t]he denial of a hearing by the California Supreme Court [does] not constitute a decision on the merits." *Shaw* v *California Dep't of Alcoholic Beverage Control*, 788 F2d 600, 605 n 3 (9th Cir 1986). See also *People* v *Triggs*, 8 Cal 3d 884, 890, 106 Cal Rptr 408 (1973) ("our refusal to grant a hearing in a particular case is to be given *no* weight") (emphasis in original); Cal Ct R 28 comment. Because, as Witkin notes, a refile order is nothing more than a delayed denial of hearing, it cannot be treated as a ruling on the merits.[2]

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[2]The majority also finds support for the proposition that the refile order was a ruling on the merits in *People* v *Osuna*, 187 Cal App 3d 845, 232 Cal Rptr 220 (1986). However, the court of appeal's offhand remark in *Osuna* will not carry the burden the majority places on it. In *Osuna*, the California Supreme Court retransferred the case to the court of appeal "with directions to refile its opinion with appropriate reference to *People v. Duncan* (1986) 42 Cal.3d 91, 227 Cal.Rptr. 654, 720 P.2d 2." *People* v *Osuna*, 231 Cal Rptr 756 (1986). The court of appeal had to figure out whether these

When the supreme court issued its refile order in *Rhymes*, it simultaneously retained jurisdiction over *Myers* precisely in order to answer the question of retroactivity. Under these circumstances, it makes absolutely no sense to suggest that the *Rhymes* order itself was a decision on the merits of retroactivity. Nonetheless, the majority holds that the California Supreme Court decided sub silentio in a one-sentence, four-justice, refile order an issue it had explicitly left open in a previous decision, and then turned around and reversed itself in a full written opinion. I am unable to agree.

II

That should be the end of the matter as far as this court is concerned: there is no need for us to inquire into the reasons that the California Supreme Court decided to resolve retroactivity in *Myers* rather than *Rhymes*. As long as the refile order in *Rhymes* was not a retroactive application of *Harris*, which it was not, it is none of our business why the California Supreme Court chose to resolve the question in one case rather than another. Nonetheless, to the extent that the supreme court's motive matters, an examination of the facts of this case reveals a perfectly rational explanation, one consistent with equal protection.

Rhymes and *Myers* both arose before the supreme court's decision in *Harris*, and both presented the *Harris* issue. Thus,

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directions were intended to change the outcome of the case. Attempting to interpret the supreme court's Delphic order, the court of appeal no doubt reasoned that the supreme court would have been more explicit had it intended to change the outcome. See *Osuna*, 187 Cal App 3d at 847.

The court of appeal—to the extent that its interpretation was correct—was not, as the majority suggests, saying that the refile order was a ruling on the merits. It was certainly not saying that such orders are intrinsically procedural or substantive. The majority relies on a stray remark made by a lower court trying to puzzle out what its superior court wanted it to do, hardly the stuff of which precedent is made.

either case *could* have been used to decide retroactivity, but only one was necessary to do so. The obvious choice was *Myers*. This was a death penalty case: by statute the California Supreme Court was required to hear Myers's appeal. See Cal Penal Code § 1239(b) (West, 1989); *Myers*, 43 Cal 3d at 255. Moreover, *Myers* presented other questions besides the *Harris* issue. See *Myers*, 43 Cal 3d at 256. *Rhymes*, on the other hand, was a collateral attack on a misdemeanor conviction, and presented the *Harris* issue alone. See *Rhymes*, 170 Cal App 3d 1100. Since the California Supreme Court had to hear *Myers* anyway, deciding the retroactivity issue in *Rhymes* would have been redundant and a waste of judicial resources. Consequently, the court sent *Rhymes* back down without review.

I suppose the supreme court could have held *Rhymes* pending a decision on retroactivity in *Myers*, but there were very good reasons for not doing so. At the time her appeal was pending in the supreme court, Deborah Rhymes was awaiting a new trial. Delay is a corrosive factor in a criminal case, potentially prejudicing the rights of the prosecution as well as the defendant. If Rhymes was to be retried—which was certainly a live possibility at the time *Myers* was set for argument—it needed to be done as promptly as possible, before the evidence grew stale and witnesses died or disappeared.[3] At the same time, *Myers*—a death penalty case—raised a number of additional issues, and was likely to take a long time to decide. In fact, a year and a half passed between the remand order in *Rhymes* and the supreme court's decision in

[3]Delay will also be a corrosive factor in Venson Myers's case. On the basis of a one sentence refile order in a different case, the majority reverses a conviction for first degree murder and several other violent crimes, a conviction affirmed by the state's highest court. *Myers*, 43 Cal 3d at 276. These crimes took place nearly eleven years ago. Id at 255. Presenting evidence at trial will now be more difficult for both sides, although the prosecution, because it carries the burden of proof, probably will suffer the greater prejudice.

Myers. The court therefore had a rational, indeed prudent, basis for sending *Rhymes* back for immediate trial.

The reasons for sending *Rhymes* back were particularly compelling, precisely because the court of appeal had anticipated the supreme court's ruling in *Harris*. While it may have been constitutionally permissible for the California Supreme Court, in a strict application of non-retroactivity, to deny *Rhymes* the benefit of a court of appeal ruling eventually proven to be correct, it would certainly have been a harsh result. I respectfully submit that the California Supreme Court is not guilty of a violation of equal protection by reserving the retroactivity question while allowing Rhymes to return to municipal court for a new trial.

The Equal Protection Clause does not require perfect equality, merely a rational decision in light of the information available to the decision maker. What the California Supreme Court did here evinces a rational, deliberate decision to deal with two litigants who were, at the time, in unequal situations. The Constitution requires no more.

Conclusion

The jurisdiction of the California Supreme Court, like that of other supreme courts, is largely discretionary; it need not decide every case that comes before it. It is also the court of last resort on questions of California law, and thus serves a function well beyond the resolution of individual cases; its primary function is to shape the law for the most populous state in the nation. Not surprisingly, a decision not to decide a case may reflect considerations independent of the merits of the dispute.

In a federal system, it behooves national courts to display considerable reticence before invading this domain. When a state supreme court takes a coherent series of actions, each amply justified by the situation confronting it, the federal

courts have no business getting involved. I fear that today's decision will seriously—and unnecessarily—complicate the already difficult task of the California Supreme Court and the eight other supreme courts in our circuit.

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APPENDIX 2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 8, 1990

VENSON LANE MYERS,	)	
	)	
Petitioner-Appellant,	)	No. 88-6334
	)	
v.	)	D.C. No.
	)	CV-88-1675-IH
EDDIE S. YLST, Warden,	)	
	)	
Respondent-Appellee.	)	ORDER
	)	

Before: FLETCHER and KOZINSKI, Circuit Judges, and MUECKE,* District Judge.

Judges Fletcher and Muecke have voted to deny the petition for rehearing. Judge Kozinski voted to grant the petition for rehearing. Judges Fletcher and Kozinski voted to reject the suggestion for rehearing en banc and Judge Muecke so recommended.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

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* Hon. C. A. Muecke, Senior United States District Judge for the District of Arizona, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED
JUN 29, 1988

VENSON LANE MYERS, Petitioner, v. EDDIE YLST, SUPERINTENDENT, Respondent.	No. CV 88-1675-IH(E) JUDGMENT

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate,

IT IS ADJUDGED that this Petition is denied and dismissed with prejudice.

DATED: 6/29, 1988.

IRVING HILL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED
JUN 29, 1988

VENSON LANE MYERS, Petitioner, v. EDDIE YLST, SUPERINTENDENT, Respondent.	No. CV 88-1675-IH(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of the United States Magistrate. The Court approves and adopts the Magistrate's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate's Report and Recommendation and the Judgment

herein by United States mail on Petitioner and Counsel for Respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 6/29/, 1988.

IRVING HILL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FILED
JUN 29, 1988

VENSON LANE MYERS, Petitioner, v. EDDIE YLST, SUPERINTENDENT. Respondent.	No. CV 88-1675-IH(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Report and Recommendation is submitted to the Honorable Irving Hill, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On March 29, 1988, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody. Respondent filed a Return on April 22, 1988. Petitioner filed a Reply to the Return on May 9, 1988.

BACKGROUND

On April 8, 1981 a Pomona Superior Court jury found Petitioner guilty of first degree murder, robbery and assault with intent to commit murder (Petition, ¶ 2). Petitioner was sentenced to death (Clerk's Transcript ("C.T."), 1266).

Prior to trial, Petitioner had moved to quash the jury venire (Petition, Ex. D). Petitioner contended that the jury selection process systematically excluded Blacks and Hispanics, thereby depriving Petitioner of his Sixth Amendment right to a jury drawn from a representative cross-section of the community. Id. At that time, Pomona venires were drawn by random selection from voter registration lists, limited to persons residing within a twenty mile radius of the Pomona courthouse. Petitioner's evidence of systematic exclusion consisted solely of statistical studies showing disparities between the percentage of Blacks and Hispanics in the total population

of Los Angeles County and the percentages of Blacks and Hispanics in Pomona jury venires during May 1979 through April 1980. Id. The trial court denied Petitioner's motion. Id. at 1363.

Three years later, while Petitioner's case was on appeal, the California Supreme Court decided People v. Harris, 36 Cal. 3d 36, 301 Cal. Rptr. 782, 679 P.2d 433, cert. denied, 469 U.S. 965 (1984) ("Harris"). By a four to three vote, the Harris court found that a defendant had established a prima facie case that the Los Angeles County jury selection process had denied him a jury drawn from a representative cross-section of the community. Defendant's evidence in Harris consisted of population studies showing disparities between the percentages of Blacks and Hispanics in the total county population and the percentages of these groups in Long Beach jury venires.

Harris held for the first time that a defendant could make a prima facie showing of group underrepresentation by introducing statistics regarding total population, rather than statistics regarding the jury-eligible population. Harris, 36 Cal. 3d at 51-58. The Court also determined that the statistical evidence in that case constituted a prima facie showing that the Los Angeles County jury selection process -- random selection solely from voter registration lists -- "systematically" excluded Blacks and Hispanics. Harris, 36 Cal. 3d at 58-59.

On January 2, 1987, the California Supreme Court decided Petitioner's appeal: People v. Myers, 43 Cal. 3d 250, 233 Cal. Rptr. 264, 729 P.2d 698 (1987) ("Myers"). The Myers court reversed the death penalty, but affirmed the judgment of guilt. The Court rejected Petitioner's jury challenge, refusing to apply retroactively the Harris decision. Myers, 233 Cal. Rptr. at 270-75. The Myers

Court reasoned that: the Harris rule did not relate to the fairness of the trial jury selection process; local authorities had reasonably relied upon pre-Harris decisions upholding the use of voter registration lists for jury panel selection; and the retroactive application of Harris would have a detrimental effect on the administration of justice in California courts. Myers, 233 Cal. Rptr. at 273-75.

At the time of the Myers decision, state courts had unfettered discretion to determine the retroactive application of state court decisions involving constitutional interpretations. See e.g. Wainwright v. Stone, 414 U.S. 21, 23-24 (1973) ("Wainwright v. Stone"). Petitioner contends that this discretion disappeared on January 13, 1987 when the United States Supreme Court decided Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed. 2d 649, 107 S.Ct. 708 (1987) ("Griffith"). Griffith determined that United States Supreme Court

decisions that announce new rules for the conduct of criminal prosecutions are "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . ." Griffith, 93 L.Ed. 2d at 661. The Griffith opinion neither expressly overrules Wainwright v. Stone nor specifically addresses the issue of whether state courts retain any discretion to define the retroactivity of new rules announced in state court decisions.

On January 20, 1988, Petitioner filed a Petition for Rehearing in the California Supreme Court, contending that Griffith required that the Court apply Harris retroactively (Return, Ex. B). On March 4, 1988, the California Supreme Court requested briefs on this issue and on the issue of whether the Court should reconsider the Harris decision (Return, Ex. C). Following briefing, the California Supreme Court denied the Petition for Rehearing without opinion (Return, Ex. F).

PETITIONER'S CONTENTIONS

Petitioner contends that: (1) the California Supreme Court erred in refusing to apply Harris retroactively; and (2) the jury selection process systematically excluded Blacks and Hispanics, thereby denying Petitioner his Sixth Amendment right to a jury drawn from a representative cross-section of the community.

DISCUSSION

For reasons discussed herein, Petitioner's contentions are without merit.

A. The California Supreme Court's Refusal To Apply Its Harris Decision Retroactively Did Not Violate Petitioner's Constitutional Rights

The Constitution does not require that a state court apply retroactively a prior constitutional ruling of that state court. Wainwright v. Stone, 414 U.S. 21, 23-24 (1973). In Wainwright v. Stone, the Florida Supreme Court refused to apply retroactively prior Florida Supreme Court decisions that had

struck down a penal statute as unconstitutionally vague. The United States Supreme Court affirmed, holding that the Florida Supreme Court was not "constitutionally compelled" to make retroactive the state court's prior rulings. Id. The United States Supreme Court declared long ago that state decisions regarding the retroactivity of prior state decisions do not raise federal constitutional issues. See e.g. Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932) ("This is a case where a [state] court has refused to make its ruling retroactive .... We think the federal constitution has no voice upon the subject").

The United States Supreme Court's recent decision in Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed. 2d 649, 107 S.Ct. 708 (1987) does not change this long established rule. The Griffith decision does hold that, when the United States Supreme Court declares a new rule for the conduct of criminal prosecutions,

that rule is to be applied retroactively by all courts (state and federal) as to cases then pending on direct review. Griffith, 93 L.Ed. 2d at 661. Petitioner argues that Griffith mandates that similar retroactivity be accorded new rules announced in state court decisions. This Court disagrees.

First, the Griffith opinion neither mentions Wainwright v. Stone nor discusses the retroactivity of new rules announced in state court decisions. Courts should be reluctant to discern the implied overruling of a recently reaffirmed, longstanding precedent. See generally, 20 Am. Jur. 2d Courts § 232 (1965).

Second, the Ninth Circuit recently indicated its understanding that Wainwright v. Stone remains good law. In a post-Griffith decision, the Ninth Circuit cited Wainwright v. Stone for the proposition that the United States Supreme Court will not order a state court to apply a state court constitutional ruling retroactively after the state court

refuses to do so. LaRue v. McCarthy, 833 F.2d 140, 142-43 (9th Cir. 1987), cert. denied, 99 L.Ed. 2d 710 (1988). The LaRue Court also cited with approval Northrup v. Alexander, 642 F. Supp. 324, 327 (N.D. Cal. 1986), observing that "the retroactivity of a state change of law is a state question and 'the federal constitution has no voice on the subject'" LaRue, supra, 833 F.2d at 142 (citations and quotation marks omitted); see also Diaz v. Scully, 821 F.2d 153, 156 (2d Cir.), cert. denied, 98 L.Ed. 2d 264 (1987) ("In Griffith, the Court modified one facet of its retroactivity principles, but did so only with respect to convictions that had not become final prior to the Court's announcement of a new rule of criminal procedure") emphasis added).

Third, Petitioner's interpretation of Griffith could lead to a logical absurdity. As discussed below, the application of Harris sought by Petitioner is erroneous as a matter

of federal constitutional law. Nevertheless, Petitioner contends that Griffith requires that the California Supreme Court apply retroactively this erroneous constitutional interpretation. Griffith does not require such an anomalous result.[1/]

Finally, as Petitioner concedes, the California Supreme Court may refuse to apply retroactively a California Supreme Court decision that is grounded on the Constitution of the State of California (See Reply Brief at 5). The Harris Court appeared to rest its decision upon Article I, Section 16 of the California Constitution, as well as the Sixth Amendment of the United States Constitution.

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1. Petitioner asked that this Court direct the California Supreme Court to apply Petitioner's reading of Harris retroactively, even though: (1) the California Supreme Court unanimously found that retroactive application would have a detrimental effect on the administration of justice, Myers, 233 Cal. Rptr. at 274; (2) Harris was a four to three decision in which three of the Justices in the majority are no longer on the California Supreme Court; and (3) the present California Supreme Court has indicated that, if Griffith requires the retroactive application of Harris, the Court may well reconsider Harris (Return, Ex. C).

Harris, 36 Cal. 3d at 45. The California Supreme Court has a history of according to criminal defendants greater rights under the California Constitution than are recognized by federal courts construing similar or identical provisions in the United States Constitution. See generally, 5 Witkin, Summary of California Law, Constitutional Laws § 98A (Supp. 1984). Even if Griffith requires retroactive application of new state court interpretations of the federal constitution, it does not require such treatment of state court interpretations in which federal and state constitutional considerations are intertwined.[2/]

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2. This Court does not reach the issue of whether the application of Harris would change the result in the present case. The Court does observe that the statistics in Harris revealed a greater "underrepresentation" of the cognizable groups than do the statistics in the present case. Harris, 36 Cal. 3d at 56. Furthermore, as the Myers Court suggested, Petitioner's failure to present population statistics for the twenty mile radius around the Pomona Courthouse might render insufficient Petitioner's evidentiary showing. Myers, 233 Cal. Rptr. at 270.

B. As a Matter of Law, Petitioner Failed to Establish a Prima Facie Violation of His Sixth Amendment Right to a Jury Drawn From a Fair Cross-Section of the Community

The United States Supreme Court has stated:

> "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive group' in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Duren v. Missouri, 439 U.S. 357, 364 (1979).

In the present case, the existence of the first element is unquestioned. The parties

bitterly contest the existence of the second element. However, the Court need not rule as to this second element[3/] because, as a matter of law, the third element is absent: Petitioner failed to make a sufficient showing that the jury selection process systematically

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3. There is some doubt that Petitioner demonstrated sufficient "underrepresentation" within the meaning of the second Duren element. At least as to Blacks, the "absolute disparities" between percentages on the venires and percentages in the County are low in comparison to disparities found constitutionally acceptable in other cases. See United States v. Tuttle, 729 F.2d 1325, 1327 (11th Cir. 1984), cert. denied, 469 U.S. 1192 (1985) (up to 9.1%); United States v. Pepe, 747 P.2d 632, 649 (11th Cir. 1984) (7.6%); United States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985) (6.67%); United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981) (7.2%); Newberry v. Willis, 642 F.2d 890, 894 (5th Cir. 1981) (6.5% disparity deemed "negligible"). Petitioner also employs "comparative disparity" percentages. But the Ninth Circuit has rejected the use of comparative percentages to establish jury underrepresentation, even where the cognizable groups are relatively small. United States v. Potter, 552 F.2d 901, 905-06 (9th Cir. 1977); see Ford v. Seabold, 841 F.2d 677, 684 n.5 (6th Cir. 1988) (rejecting the "Statistical Decision Theory" as inappropriate to Sixth Amendment challenges); United States v. Rodriguez, 776 F.2d 1509, 1511 n.4 (11th Cir. 1985); United States v. Pepe, 747 F.2d 632, 649 n.18 (11th Cir. 1984) ("the relative measure may distort the significance of the deviation"); United States v. Hafen, 726 F.2d 21, 23-24 (1st Cir. 1984); United States v. Clifford, 640 F.2d 150, 155 (8th Cir. 1981).

excluded the cognizable groups.

At the time of Petitioner's trial, Pomona jury venires were drawn at random from voter registration lists, limited to persons within a twenty mile radius of the courthouse. Any underrepresentation of Blacks or Hispanics on jury venires apparently resulted from the failure of these groups to register to vote in proportion to their numbers in the general population during the 12 month period covered by Petitioner's statistics. Petitioner did not allege any discrimination in the voter registration process. As a matter of law, Petitioner's showing failed to demonstrate systematic exclusion of the allegedly underrepresented groups.

The United States Supreme Court (impliedly though not expressly) has approved the use of voter registration lists for jury selection. In Taylor v. Louisiana, 419 U.S. 522, 528 (1974), the Court referred approvingly to "recent federal legislation governing jury

selection." That legislation, which became 28 U.S.C. §§ 1862-66, contemplates the use of voter registration lists as the primary if not exclusive source for jury draws. In Duren v. Missouri, 439 U.S. 357 (1979), the Court considered a jury selection process that began with a random selection from a voter registration list. Id. at 361. Although the Court found later stages of the process unconstitutional, the Court acknowledged that it found no "systematic" exclusion at the initial stage, the random selection from the voter registration list. Id. at 366; but see California v. Harris, 468 U.S. 1303, 1304 (1984) (In denying an application for a stay, Justice Rehnquist indicated his understanding that the issue of whether random selection from voter registration lists "systematically" excludes groups is not an "open and shut" question under Duren).

The Ninth Circuit has held that random selection from voter registration lists does

not involve "systematic exclusion." United States v. Brady, 579 F.2d 1121, 1133-34 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979). Defendants there attempted to rely upon the fact that Indians had a low registration rate in general elections. The Ninth Circuit dismissed the relevance of this fact. "It is of no importance that Indians may have a tendency not to register to vote in non-Indian elections." Id. at 1134.

Every other federal appellate court to have considered the issue similarly has held that random selection from voter registration lists does not systematically exclude groups whose members do not register to vote in proportion to their numbers. United States v. Cecil, 836 F.2d 1431, 1447-55 (4th Cir. 1988); United States v. Young, 822 F.2d 1234, 1239-40 (2d Cir. 1987); United States v. Afflerbach, 754 F.2d 866, 869-70 (10th Cir.), cert. denied, 472 U.S. 1029 (1985); United States v. Jones, 687 F.2d 1265, 1269-70 (8th

Cir. 1982); United States v. Wesevich, 666 F.2d 984, 990 (5th Cir. 1982); United States v. Clifford, 640 F.2d 150, 155-56 (8th Cir. 1981); United States v. Hanson, 618 F.2d 1261, 1267 (8th Cir.), cert. denied, 449 U.S. 854 (1980); United States v. Lewis, 472 F.2d 252, 256 (3d Cir. 1973.)[4/] Even if this Court were not bound by the Brady decision, it would be reluctant to suggest the creation of a direct conflict with other circuits. See United States v. Chavez-Vernaza, Nos. 86-3178; 86-3187, slip op. at 5303 (9th Cir. May 5, 1988).

"Systematic exclusion" requires that the cause of the underrepresentation be "inherent in the particular jury-selection process utilized" -- that exclusion be "due to the

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4. Even the two appellate cases cited by Petitioner support this principle. See Alston v. Manson, 791 F.2d 255, 258 n.1 (2d Cir. 1986), cert. denied, 94 L.Ed. 2d 143 (1987) (dicta refers to a voter registration requirement for jury service as "presumably licit"); United States v. Butera, 420 F.2d 564, 573 (1st Cir. 1970) ("It has become well-established that voter registration lists are appropriate for use in jury selection systems").

system by which juries were selected." Duren v. Missouri, 439 U.S. 357, 366, 367 (1979). In the present case, as in Brady and the other appellate cases cited, the cause of the alleged underrepresentation was not inherent in the system. Venires were drawn at random from a list on which each qualified citizen had an equal right to be included.[5/] Nothing "inherent" in the system caused the alleged underrepresentation. It was not "inherent" in the system that disproportionately large percentages of Blacks and Hispanics would choose not to register to vote during 1979-80.

Petitioner's argument seems to be that proof of "systematic" exclusion exists whenever there exists proof of underrepresentation. Petitioner's argument would render superfluous the third element of the Duren test. Necessarily, any apparent underrepre-

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5. As Justice Mosk's dissent in Harris points out, the voter registration list is more egalitarian than any other available list of adult citizens. Harris, 36 Cal. 3d at 73-74.

sentation "resulted" from the operation of whatever system was then in place. The system operated; the underrepresentation occurred. If the Duren Court had intended that systematic exclusion follow a fortiori from evidence of underrepresentation, it would not have defined systematic exclusion as a separate requirement.

CONCLUSION AND REPRESENTATION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: May 25, 1988.

CHARLES F. EICK
United States Magistrate

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file

objections as provided in the Local Rules Governing the Duties of Magistrates and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 19__

EDDIE S. YLST, Petitioner,

v.

VENSON LANE MYERS, Respondent.

PROOF OF SERVICE UNDER RULE 29.5(c)

I, JOSEPHINE D ROSE, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, Los Angeles, California 90010;

I served one copy of the **PETITION FOR WRIT OF CERTIORARI** in the above-entitled case on each of the following person(s):

FERN LAETHEM
State Public Defender
Attn. Michael Pescetta, Deputy
Counsel for Respondent
1390 Market Street, Suite 425
San Francisco, CA 94102

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on July 13, 1990, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 13, 1990, at Los Angeles, California.

_____

Declarant

JOSEPHINE D. ROSE

TLW:ksa
LA88FH0017

ORIGINAL

No. 90-112

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

EDDIE S. RUST, Warden, Petitioner,

v.

VENSON LANE MYERS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should plenary review on certiorari be granted to decide: (1) Whether a decision that a state court must afford similar treatment to similarly situated litigants, with respect to an issue of state law, is a "new" rule under Teague v. Lane and its progeny; and

(2) Whether the guarantee of equal protection of the laws permits a state court to afford radically inconsistent treatment to similarly situated litigants, when there is no justification for the distinction in treatment.

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No. 90-112

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

EDDIE S. YLST, Warden, Petitioner,

v.

VENSON LANE MYERS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respondent VENSON MYERS respectfully prays that this Court deny the petition for certiorari, seeking review of the decision of the Court of Appeals for the Ninth Circuit in this case. That opinion is reported at 897 F.2d 417.

STATEMENT OF THE CASE

This case involves a denial of equal protection of the laws by the highest court of a state in its application of state law. The facts relevant to the issue presented here are as follows:[1/]

In 1984, the California Supreme Court had before it four cases involving the same issue: whether, under the state constitution, a prima facie showing of systematic racial underrepresentation in criminal jury venires could be made by relying upon gross population statistics or required refinement of the statistical data to isolate the jury-eligible population. These cases were respondent's (People v. Myers, Crim. No. 21991); People v. Harris, Crim. No. 21633; In re Rhymes, Crim. No. 22024; and People v. Bell, Crim. No. 20879. Myers, Harris and Bell were before the Supreme Court on automatic appeals of judgments of death. The Supreme Court granted hearing in Rhymes after a decision in the California Court of Appeal affirming the lower court's reversal of a conviction on the ground of systematic underrepresentation shown by gross population statistics.[2/]

[1/] The facts of respondent's conviction of murder with a special circumstance. (Cal. Pen. Code, §§ 187, 189, 190.2, subd. (a)(17)(i)) are not at issue here.

[2/] Under California law in effect at the time, the grant of hearing in Rhymes completely nullified and superseded the [Fn. cont.]

Rhymes and Myers arose in the same county at the same time, and the jury selection question in each case had been litigated upon an essentially identical, common factual record.

In 1984, the California Supreme Court issued its opinion in Harris and decided under the California constitution that a showing of systematic underrepresentation could be predicated upon gross population statistics. People v. Harris, 36 Cal.3d 36, 48, 59, 201 Cal.Rptr. 782, 679 P.2d 433 (1984). The court reserved the question of the retroactivity of the decision. Id. at 59.

In 1985, the Supreme Court, without any reference to retroactivity, ordered the Rhymes case returned to the Court of Appeal with explicit directions to file its former opinion, thus ordering the reversal of the case. See In re Rhymes, 170 Cal.App.3d 1100, 217 Cal.Rptr. 439 (1985).[3/]

Then, in 1987, the Supreme Court decided respondent Myers' case. Although acknowledging that the issue, and the record supporting it, were identical in Myers and Rhymes,

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[Fn. cont.]

Court of Appeal decision and transferred the case in its entirety to the Supreme Court for plenary consideration. Knouse v. Nimocks, 8 Cal.2d 482, 483, 66 P.2d 438 (1937).

3/ Under California law, the Court of Appeal was without jurisdiction to act in any way other than as directed by the Supreme Court. Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321 369 p.2d 937 (1962).

respondent's case on the theory that Harris was not retroactive. People v. Myers, 45 Cal.3d 250, 261, 233 Cal.Rptr. 264, 729 P.2d 698 (1987). The Supreme Court did not address the equal protection issue raised by its action in ordering the reversal of Rhymes' conviction on the basis of a rule which it then refused to apply to respondent on an identical record presenting the same issue. This issue was specifically drawn to the Court's attention in respondent's petition for rehearing.

Finally, in 1989, the Supreme Court again applied the Harris rule in Bell, without any reference to the purported retroactivity rule relied upon in respondent's case. "Because the court accepted total population figures rather than adult, presumptively jury eligible, population figures to establish a prima facie case in People v. Harris . . . we do so here." People v. Bell, 49 Cal.3d 502, 526 n. 12, 262 Cal.Rptr. 1, 778 P.2d 129 (1989) (emphasis supplied).4/

Respondent's petition for a writ of habeas corpus under 28 U.S.C. § 2254 was denied by the United States District Court for the Central District of California in a judgment and order which failed to address respondent's equal protection claim. On appeal, the Court of Appeals for the Ninth Circuit reversed, with one judge dissenting from

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4/ The Bell case was drawn to the attention of the Court of Appeals under Rule 28(j) of the Federal Rules of Appellate Procedure but it was not cited in its opinion.

the panel opinion. The court held that respondent's rights under the equal protection clause of the Fourteenth Amendment had been violated, because "once a state has established a rule it must be applied evenhandedly." Myers v. Ylst, 897 F.2d 417, 421 (9th Cir. 1990), quoting La Rue v. McCarthy, 833 F.2d 140, 142 (9th Cir. 1987), citing Johnson v. State of Arizona, 462 F.2d 1352, 1354 (9th Cir. 1972).

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REASONS FOR DENYING THE WRIT

I

AN APPLICATION OF THE EQUAL PROTECTION CLAUSE REQUIRING A STATE TO TREAT SIMILARLY-SITUATED LITIGANTS SIMILARLY DOES NOT IMPOSE A "NEW RULE" WITHIN THE MEANING OF TEAGUE v. LANE

Petitioner argues that the equal protection rule applied in this case is a "new rule" within the meaning of Teague v. Lane, 489 U.S. ___, 103 L.Ed.2d 334, 356, and its progeny. Petitioner's argument assumes that over a hundred years of this Court's jurisprudence applying the equal protection clause of the Fourteenth Amendment has not yet established the rule that a state court, in applying state law, must treat similar cases similarly. Petitioner's assertion that certiorari should be granted to address this question is nonsense.

It has long been settled that the application of state law by a state court can violate the equal protection clause. In an unquestioned line of cases extending from Virginia v. Rives, 100 U.S. 313, 318 (1880), through Shelley v. Kraemer, 334 U.S. 1, 14-15 (1948), to Columbus Board of Education v. Penick, 443 U.S. 449, 457 n. 5 (1979) this Court has held that the actions of a state court, like the actions of any state agency, are subject to scrutiny for equal protection violations. Accord, Palmore v. Sidoti, 466 U.S. 429, 432-435 (1984) [reliance by state court on racial factor in making child custody decision]; Draper v. Washington, 373 U.S. 487, 489-490, 494-499 (1963)

[application of state court's rules on entitlement to transcript on appeal]. There is no novelty in the application of the Fourteenth Amendment to the actions of a state court.

It is equally well-settled that, substantively, the equal protection clause requires states to apply state law rules evenhandedly and thus to treat similar cases similarly. The clause guarantees "the right . . . to equal treatment. . . ." Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 247 (1931). "Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances." Maxwell v. Bugbee, 250 U.S. 525, 541 (1919). "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike'." Plyler v. Doe, 457 U.S. 202, 216 (1982), quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The cases in which this Court has applied this principle, which is obvious from the plain words of the equal protection clause itself, are too numerous to rehearse; and its application by the Court of Appeals in this case breaks no new ground.

Petitioner's attempt to characterize the Court of Appeals' application of these unquestioned principles as a "new rule" under Teague is ridiculous. The application of the equal protection clause in this situation is clearly "controlled" by this Court's precedents. See Butler v. McKellar, 494 U.S. ___, 108 L.Ed.2d 347, 356 (1990). A contrary ruling would mean that the Fourteenth Amendment --

a provision specifically directed at curbing state action -- could never be applied to a state court conviction on collateral review, regardless of how clearly prior caselaw mandaqted its application. Nothing in Teague or its progeny suggests so bizarre a result.

The flimsiness of petitioner's claim on this point is accentuated by its failure to advance the Teague argument before the filing of the petition for rehearing in the Court of Appeals. Teague was decided on Feburary 22, 1989, 103 L.Ed.2d 334, well before the oral argument in this case (which was held in the Court of Appeals on April 4, 1989), and over a year before the decision was issued (on February 28, 1990). Yet petitioner neither alluded to Teague in argument, nor sought to draw the decision to the attention of the Court of Appeals after argument, under Rule 28(j) of the Federal Rules of Appellate Procedure. This strongly suggests that petitioner's invocation of Teague is a belated attempt to inject an issue ostensibly justifying review on certiorari where no such issue in fact exists in the case.

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II

THE INCONSISTENT TREATMENT AFFORDED BY THE CALIFORNIA SUPREME COURT TO SIMILARLY SITUATED LITIGANTS WHOSE CASES PRESENTED THE IDENTICAL ISSUE VIOLATED THE EQUAL PROTECTION CLAUSE

There is no factual dispute as to the actions of the California Supreme Court which give rise to respondent's equal protection claim. The court enunciated a rule of state law in Harris; it ordered the reversal of the conviction in Rhymes on the basis of the same interpretation of the state rule; it then denied the benefit of that rule to respondent, whose case presented the identical issue, on the same record, as in Rhymes; and it then applied the rule again in Bell. The imagination could not construct a more obvious instance of a state rule "applied. . . with an evil eye and an unequal hand," Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886) which violates the equal protection clause. No plausible argument can be made that review on certiorari is necessary to reiterate this Court's consistent jurisprudence condemning such unequal treatment.

Petitioner, and the dissent in the Court of Appeals, mischaracterize respondent's claim as an effort to dictate to the California Supreme Court in which case--Rhymes or Myers--it would decide the question of the retroactivity of Harris. Petition at 28; Myers v. Ylst, supra, 897 F.2d at 426 (Kozinski, J., dissenting). This is inaccurate. The question is not one of form, as to which case should have been decided first. Rather, it is a

question of substance: whichever case was the vehicle for deciding whether Harris was retroactive, the other, similarly-situated case had to be decided the same way so that each case would receive "equal protection"--that is, equal application or non-application--of the Harris rule. What is wrong with this case is that the California Supreme Court refused to apply the Harris rule here, purportedly on the basis of retroactivity, but it had already directed the reversal of the conviction in Rhymes without any mention of retroactivity, and it subsequently applied Harris in Bell, again without any mention of retroactivity. This case presents a clear situation of a state court arbitrarily applying a rule of state law; it is precisely this unequal treatment that the equal protection clause of the Fourteenth Amendment does not permit.

The sole rationale advanced for the difference in treatment between respondent's case and Rhymes is that the California Supreme Court's disposition of Rhymes was a "housekeeping" measure. Myers v. Ylst, supra, 897 F.2d at 426 (Kozinski, J., dissenting). Petitioner seeks to inflate this by characterizing it as the court's "management of its docket" and its "shaping of state law." Petition at 22, 32. There is, however, not one scintilla of evidence in the record in this case to support such a conclusion: nothing in the Supreme Court's order in Rhymes or decision in Myers suggests this rationale.

Neither does petitioner, or the dissenting judge in the Court of Appeals, explain how the mere convienience of a court in disposing of its cases creates a "difference" which bears a "fair relationship to a legitimate public purpose" Plyler v. Doe, 457 U.S. 202, 216 (1982), which would justify completely different treatment of litigants whose cases present an identical issue and which are pending before the same court at the same time. Still less does this "housekeeping" theory distinguish between similarly-situated cases in a way which is "precisely tailored to serve a compelling governmental interest", id. at 217, the standard which would apply to the proffered distinction in light of the state's obligation to conduct its system of appellate review consistent with the demands of due process of law. See Evitts v. Lucey, 469 U.S. 387, 401-405 (1985).

This "housekeeping" theory also depends upon interpretation of the state procedural rules relating to petitions for hearing to determine the effect of the California Supreme Court's action in Rhymes. Myers v. Ylst, supra, 897 F.2d at 422-423; id. at 426-428 (Kozinski, J., dissenting). Those rules are no longer in effect, see West's Cal. Rules of Court, Rule 29.4 and Advisory Committee Comment, at p. 30 (1986); and this renders review on certiorari particularly inappropriate. Rice v. Sioux City Cemetery, 349 U.S. 70, 77 n. 1 (1955).

Finally, whatever purported distinction may be suggested between respondent's case and Rhymes, there is no

such distinction between respondent's case and Bell. Both Myers and Bell were capital cases, pending before the California Supreme Court at the same time; and the jury selection in Bell predated the jury selection in Myers. See People v. Bell, supra, 49 Cal.3d at 513, 521; People v. Myers, supra, 43 Cal.3d at 255, 260-261. Yet the California Supreme Court applied the Harris rule retroactively in Bell, 49 Cal.3d at 526 n. 12, after denying respondent the benefit of that rule on the supposed ground of non-retroactivity. Although the Bell decision was drawn to the attention of the Court of Appeals before its decision, neither the dissenting judge in the Court of Appeals, nor the state in its petition for certiorari, suggests any reason why Bell should have the benefit of the supposedly non-retroactive Harris rule while respondent was denied that benefit. The complete absence of any conceivable rational distinction between Bell and Myers to justify the application of Harris in one case and not the other is a clear demonstration of the equal protection violation, irrespective of any purported justification for the difference in treatment in Rhymes. This, in turn, renders the question presented by the petition for certiorari inappropriate for certiorari review.

We submit that the constitutional principle at issue is quite clear; the only basis for believing that a ruling in this case would have an important or widespread effect would be the assumption that state courts do habitually apply state law rules in an arbitrary fashion. Absent

that assumption, there is no basis for characterizing the plain and simple application of the equal protection clause to this case as presenting an important or novel question of constitutional law which would justify an exercise of this Court's discretionary jurisdiction. See Supreme Court Rule 10.1. To the contrary, this case presents an application of "settled [constitutional] law," Estelle v. Gamble, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting), to an "isolated incident", Rice v. Sioux City Cemetery, supra, 349 U.S. at 77, which makes "review on certiorari . . . patently inappropriate." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 223 (6th ed. 1986).

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EDDIE S. YLST, Warden, Petitioner,

v.

VENSON LANE MYERS, Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I served a copy of the accompanying BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI and MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, by depositing a copy of each document in the United States mail, first class mail, postage prepaid, addressed as follows:

JOHN VAN de KAMP
Attorney General of the
State of California
3580 Wilshire Boulevard
Los Angeles, CA 90010
Attention: Thomas L. Willhite, Jr.

All parties required to be served have been served.
Done this 16th day of August, 1990.

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CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

DATED: August 16, 1990

Respectfully submitted,

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MP:vb